Toffoloni v. LFP Publishing Group, LLC Doc. 73 Att. 11

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI,	)	
as Administrator and Personal	)	
Representative of the ESTATE	)	
OF NANCY E. BENOIT,	)	
	)	CASE NO. 1:08-cv-00421-TWT
Plaintiff,	)	
	)	
vs.	)	
	)	
LFP PUBLISHING GROUP, LLC,	)	
d/b/a Hustler Magazine, et al,	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION
FOR PROTECTIVE ORDER

EXHIBIT J

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January 25, 2008

RECEIVED
JAN 28 2008

Via UPS Overnight

Richard P. Decker, Esq.
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260 Peachtree Street, N.W.
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Re: Nancy Toffoloni Benoit Photographs

Dear Mr. Decker:

This firm is retained counsel for LFP Publishing Group, LLC ("LFP"), the publisher of *Hustler Magazine*. We have been asked to respond to your letter to LFP dated January 16, 2008 with regard to the publication of nude and partially nude photographs of the late Nancy Benoit. We understand that in this matter, you are representing Maureen Toffoloni and/or the Estate of Nancy Benoit.

In said letter, you protest the publication by *Hustler Magazine* of said photos of Nancy Benoit, and demand that *Hustler* agree not to publish same. On behalf of LFP and *Hustler*, we must respectfully deny your request.

In your letter, you first indicate that your client would have legal title in any copyright to a likeness of Nancy Benoit. This contention is erroneous. The copyright in the photographs belongs to the photographer/videographer who originally took the pictures as their author pursuant to the United States Copyright Act, 17 U.S.C. § 101 *et seq*. Here, LFP is informed that the subject photographs were images made from a motion picture video, for which Nancy Benoit clearly and voluntarily posed. LFP has obtained the permission of the copyright holder to publish said photographs, and therefore your client has no copyright claim herein.

You further assert that any use of the likeness of Nancy Benoit is "prohibited, unauthorized, and denied," citing Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc., 250 Ga. 135 (1982), and that unless *Hustler* agrees not to so publish, you will file suit in a Georgia court, citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

The Supreme Court's Keeton decision concerns personal jurisdiction, statutes of limitations, and related procedural issues, rather than substantive rights. It is accordingly not relevant to this response. The substantive opinion of the Georgia Supreme Court in the King case is relevant, but does not serve to support your client's position.

As you are aware, the recent tragic death of Nancy Benoit, apparently murdered by her husband in their home, made national headlines in the newspapers, and was extensively covered by both network and cable television news shows. Aside from her husband Chris, Nancy herself had been a popular personality in the wrestling world, and was well-known by the national wrestling organizations and wrestling fans throughout the country. She was accordingly a public figure and celebrity, and her gruesome death was unquestionably of great public interest. Accordingly, Georgia, the State of her domicile, would afford her a right of publicity, not to have her name or photograph used "for the financial gain of the user without [her] consent, where such use is not authorized as an exercise of freedom of the press." 250 Ga. at 143.

Here, there is no such violation of Nancy Benoit's right of publicity by publication of her likeness in *Hustler Magazine*. The photographs of Ms. Benoit as a beautiful young woman in her twenties are being used to illustrate a legitimate and serious news article in the Magazine on her life, including her early career, her attempts at modeling, her various marriages, and her attempts to pose for *Penthouse Magazine*. Thus, we are not dealing with a commercial exploitation of Ms. Benoit's image for monetary gain, but as part of a legitimate news story. Such use by *Hustler Magazine* is clearly authorized and protected by the First Amendment to the United States Constitution, as is expressly recognized by the Georgia Supreme Court in its King decision. Such lawful publication of photos of a deceased public figure in a matter of public interest is sharply contrasted with the clearly unauthorized and unlawful appropriation of the property rights in a decedent's image for commercial exploitation, as was seen in the facts of the King case. Recognizing the First Amendment right of publication by a free press in matters of public interest, as opposed to mere advertisements or commercial use, the Georgia Supreme Court in King itself acknowledged the press' right of free expression in this country.

To the extent that your client may attempt to assert some kind of "privacy" right in the images of Nancy Benoit, privacy rights are designed to protect values of human dignity. However, it is long-established law that such privacy rights end with the death of the person whose privacy was allegedly invaded.

To summarize, your client does not own any copyright interest in the photographs of Nancy Benoit, and the use of her photographs in connection with a legitimate news article of public interest in *Hustler Magazine* does not afford any right of publicity, and would otherwise be precluded by the freedom of the press contained in the First Amendment.

Lipsitz Green Scime Cambria LLP

While we certainly sympathize with your client's grief as to the senseless murder of Nancy Benoit, *Hustler Magazine* has every legal right to publish said photographs as part of a legitimate news article on her life and death, as a matter of substantial public interest.

Sincerely,

LIPSITZ GREEN SCIME CAMBRIA LLP
Attorneys for Hustler Publishing Group, LLC

By: ______________________
Paul J. Cambria, Jr., Esq.

PJC/WMF/lv

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